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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 895.

WILLIAM COLE,
Petitioner,

vs.

DOOR COUNTY MEMORIAL HOSPITAL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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HISTORY OF CASE.

On or about September 1, 1959, the Door County Memorial Hospital of Sturgeon Bay, Wisconsin, Respondant herein, but plaintiff below, filed an action in the Municipal Court of Cleveland against William Cole, Sr., Petitioner herein but defendant below, on an account for services rendered by said Hospital for and on behalf of the wife and child of said Cole, in the sum of Three Hundred Eighteen Dollars and Thirty-six Cents ($318.36).

The case was numbered A-532-331 and entitled Door County Memorial Hospital, Plaintiff v. William Cole, Sr. defendant, and with the petition the plaintiff filed an affidavit in attachment against the Tomlinson Fleet Corporation, by which it was admitted that defendant was employed at the time.

The grounds for the attachment were two:

1.—Non-residence of defendant, and

2.—Necessaries, to-wit: Hospital and medical services furnished the wife and child of defendant.

The Tomlinson Fleet Corporation, garnishee, filed an Answer on September 5, 1959, and the plaintiff filed a Motion to Strike same because said Answer did not set up what money or property of defendant it was holding, but merely put up an argument that it was not bound by said Order of Attachment, which motion was granted, November 18th, 1959, with the following entry:

"Plaintiff's motion granted—Garnishee excepts—Answer of garnishee stricken—Garnishee not party to lawsuit"—

On December 8, 1959, the Answer of Defendant was filed, setting up two defenses:

1st —That he did not owe amounts sued for, and

2nd—That he was a seaman in the United States Merchant Marine and that as such by the laws of the United States his wages were not subject to garnishment or attachment.

To this Answer, plaintiff filed a reply. The case came on for trial on February 17, 1960, and on March 21, 1960, the following entry was made:

"Parties in Court: Trial had: Court finds and renders judgment against defendant for $378.24. Attachment sustained; garnishee ordered to pay into court amount sufficient to satisfy judgment and costs."

On March 30, 1960, notice to the garnishee, that is, the Tomlinson Fleet Corporation, of judgment rendered and order entered, was served on said garnishee.

It is to this order on said garnishee that this appeal is directed, as witnessed by Assignment of Error filed in

the Court of Appeals of Cuyahoga County, Ohio therein, by Petitioner herein which reads as follows:

> "The trial court erred in sustaining the attachment of the seaman defendant's wages due from the Tomlinson Fleet Corporation, garnishee herein."

There is no claim by the Appellant that the Municipal Court erred in rendering judgment against the firm on the amount due, to-wit: Three Hundred Seventy-eight Dollars and Twenty-four Cents ($378.24), with interest and costs.

I should like to call the Court's attention to the fact that it is only the order in attachment that is appealed from, not the judgment.

Plaintiff-appellee, Respondent herein filed its brief in the Court of Appeals, in answer to the original Brief and Assignments of Error filed by the defendant-appellant Petitioner herein on March 23, 1960.

Hearing was had before the Court of Appeals on December 14, 1960, and on December 22, 1960, the Court of Appeals handed down its decision, affirming the judgment of the Municipal Court, according to Journal Entry set forth on page 9 of Appendix in Petitioner's Petition, and rendered its opinion, which is shown on page 7 of Appendix in Petitioner's Petition.

From this decision and opinion of the Court of Appeals, the Petitioner on January 11, 1961 filed his motion in the Supreme Court of Ohio to order the Court of Appeals to certify its record, which motion after filing of brief and argument on March 6, 1961 was overruled by said Supreme Court of Ohio as appears on page 10 of appendix in Petitioner's Petition.

ARGUMENT AND LAW.

Now, as to the question that the Petitioner is raising hereto, to the effect that the Tomlinson Fleet Corporation is not bound by the order in attachment issued out of the Municipal Court of Cleveland and served upon it, because the defendant Cole, at the time of the service of said order in attachment, was a seaman on a vessel sailing the Great Lakes and employed by said Tomlinson Fleet Corporation, counsel for Respondent contends that it is improperly before this Court at this time, and could not be raised without the garnishee, the Tomlinson Fleet Corporation being in court, but since it has been brought in and will be brought in if this action is ever properly brought, I will only refer to it in passing.

This action was brought under the following section of the Revised Code of Ohio, Sec. 2715.01—Grounds of Attachment:

> "In a civil action for the recovery of money at or after its commencement the plaintiff may have an attachment against the property of the defendant upon any one of the following grounds:
>
> (b) That the defendant is not a resident of this State.
>
> (k) That the claim is for work or labor or for necessaries."

The affidavit in attachment was brought upon these two grounds, to-wit: The defendant is not a resident of this state and the action is for necessaries, to-wit: Medical and hospital services furnished the wife and minor child of Defendant-appellant, Cole.

The order of attachment was made and served upon the garnishee in this case under Rev. Code Secs. 2715.30. 2715.29:

"The garnishee is required to answer concerning money or credits in its possession or under its control or owing to debtor from the time of the service in attachment upon it and to hold same subject to the order of the court until further order or final disposition of the case."

Is there anything in the Code or in law cited under it allowing for exceptions either to an employer of a Merchant seaman or anybody else under the jurisdiction of the court so they do not have to answer and hold funds in their possession when an order of garnishment is served upon them? If, so, this counsel for Respondent would be delighted to see the same.

The attorney for the Petitioner has cited a number of cases, but not one concerning these statutory laws of the State of Ohio, and would this court be justified in setting all these statutes aside, declaring them null, void and of no effect because the defendant happens to be in the employ of a corporation existing and doing business in the City of Cleveland, Ohio, and under the jurisdiction of the Municipal Court thereof?

The Petitioner's contention is based upon a Federal statute of 1874, which declared no wages accruing to a seaman shall be subject to attachment or garnishment and a ruling of the Supreme Court in 1908 upheld the same, but the statute and the supporting cases were passed and decided prior to the enactment in 1915 of the Federal statute, which is now 46 U. S. C. A. Sec. 601, which reads as follows:

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment

thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen; *Provided*. That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the *support* and *maintenance of his wife and minor children.*" Mar. 4, 1915. c. 153, Secs. 12.38. Stat. 1169.

The Respondent contends that this order served upon the garnishee in the case at bar comes squarely within the provisions of the Federal statute as being an order by any court (Municipal Court of Cleveland) regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and children.

Certainly an order of the Municipal Court for the payment of a portion of Petitioner's wages into court for support and maintenance of his wife and minor child comes squarely within the provisions of this statute. The Municipal Court of Cleveland so held, which is the first decision, I believe, that has ever been made on this subject in the State of Ohio.

Because the attorney for the Petitioner has cited only two cases interpreting the above quoted statute since the amendment thereto was adopted in 1915, these are the only two which counsel for Respondent will concern himself, to-wit: *Avila v. Avila*, 183 P. 2nd, 668, and *Cunningham v. McCullough*, 22 N. Y. S. 2d 739.

The case of *Avila v. Avila*, cited on the third page of defendant-appellee's brief is where a divorced wife tried to hold a seaman's wages on a decree for alimony for herself and children after same had been reduced to judgment. The court held same as alimony as distinguished

from an ordinary debt, but an execution was issued upon the judgment in the alimony award and his wages were held under said order and the debtor filed his motion to have them declared exempt under Sec. 601 of Title 46 U. S. C. A., which request the court refused and was sustained by the Court of Appeals.

This is actually the situation at bar except that this is an order of attachment issued upon the ground that the same are for *necessaries furnished defendant's wife and child*, instead of a judgment based on a decree for alimony.

The case of *Cunningham v. McCullough* seems to be authority that injunctive provisions of third-party subpoena would be vacated where wages of a seaman are involved, although apparently for board and lodging of a daughter of a seaman, as the same was not a court order regarding the payment by any seaman for the support of his wife and children, although based upon a judgment by plaintiff against defendant debtor for support of his said wife and children. However, this case is authority to the effect that if such order had been made by a court, it could be enforced against the wages of a seaman, such as orders that might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as Domestic Relations Court of the City of New York.

The counsel for Respondent has to confess ignorance of what the injunctive provisions of third-party subpoena could possibly be in the above case cited. This is certainly not equivalent to an order issued by the Municipal Court of Cleveland to pay money into court on an order for the support of wife and minor child of Petitioner.

So nothing has been shown to prevent the working of the amendment to the Federal statute above quoted to the effect that an order of Municipal Court of Cleveland upon the garnishee herein served upon the same should not

bind whatever money the Petitioner had in the possession of said garnishee until final disposition of the case, and the same should be paid into court upon service of the order upon it by the court to that effect.

CONCLUSION.

Counsel for Petitioner is seeking to avoid the effect of the amendment of 1915 to the statute of 1874 before quoted, providing that nothing contained therein should interfere with the order of any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children, by denying that the judgment of the Municipal Court, which is the subject of this action, constitutes such an order. But certainly an order of attachment based on a claim for care and medical treatment of the wife and baby of defendant can be nothing else, and counsel for Petitioner knows this because the one assignment of error he alleges in his appeal to the Court of Appeals, is not the rendition of the judgment, but that the trial court erred in sustaining the attachment of the seaman defendant's wages, due upon the Tomlinson Fleet Corporation, garnishee herein.

Certainly you cannot have an attachment without an order—that is what was done in this case—the decree of attachment constitutes an order.

When the case was filed, the order of attachment was issued and served upon the garnishee and when the judgment was rendered, the order of attachment was sustained and served upon the garnishee to pay the money into court.

Everything was regular and according to law, the procedure of the Municipal Court has been affirmed by the Court of Appeals and the Supreme Court of Ohio, and no grounds for appealing same has been shown and the same

should be allowed to stand and a mandate issued to carry the same into effect.

Respectfully submitted,

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Of Counsel.